

authority with a special instruction that the case is not a capital referral.” The above-captioned case was referred to a general court-martial without special instructions.

The United States adds the following additional facts:

The *Benchbook* publishes the following model specification for Giving Intelligence to the Enemy under Article 104(2), UCMJ:

In that _____ (personal jurisdiction data) did, (at/on board—location), on or about _____, without proper authority, knowingly give intelligence to the enemy (by informing a patrol of the enemy’s forces of the whereabouts of a military patrol of the United States forces) (_____).

The *Benchbook* lists the following elements for Giving Intelligence to the Enemy under Article 104(2), UCMJ:

- (1) That (state the time and place alleged), the accused, without proper authority, knowingly gave intelligence information to (a) certain person(s), namely: (state the name or description of the enemy alleged to have received the intelligence information);
- (2) That the accused did so by (state the manner alleged);
- (3) (state the name or description of the enemy alleged to have received the intelligence information) was an enemy; and
- (4) That this intelligence information was true, at least in part.

WITNESSES/EVIDENCE

The United States requests this Court consider the following enclosures:

1. *Department of the Army, Pam. 27-9, Military Judges’ Benchbook*, Ch. 3, pp. 319-325 (1 January 2010)
2. Charge Sheet
3. Enclosure 1 to Appellate Exhibit XIV (Bill of Particulars)

LEGAL AUTHORITY AND ARGUMENT

A specification is a plain, concise, and definite statement of the essential facts constituting the offense charged. RCM 307(c)(3). A specification is legally sufficient when it (1) alleges all the elements of the offense, (2) provides notice to the accused of the offense against which he must defend, and (3) gives sufficient facts to protect against re-prosecution.

See *United States v. Sell*, 11 C.M.R. 202, 206 (C.M.A. 1953). Every element must be alleged expressly or by necessary implication. RCM 307(c)(3). Specific evidence supporting the allegations ordinarily should not be included in the specifications. RCM 307(c)(3) discussion (G)(iii).

I. THE SPECIFICATION OF CHARGE I ADEQUATELY STATES AN OFFENSE.

The Specification of Charge I is legally sufficient because it alleges all the elements of the Article 104 offense in this case, either expressly or by necessary implication. The Specification contains the name, rank, and military association of the accused (“Private First Class Bradley E. Manning, U.S. Army”); the date and place of the offense (“Contingency Operating Station Hammer, Iraq, between on or about 1 November 2009 and on or about 27 May 2010”); a description of the offense (“give intelligence to the enemy, through indirect means”), including the *mens rea* required (“knowingly”); and includes words indicating criminality (“without proper authority”), as required by RCM 307(c)(3). See RCM 307(c)(3) discussion (C)(i)–(ii); (D)(i), (iii); (E); (G)(i), (iii). No additional information is required to be alleged. See *id.* Further, the Government’s filing of a Bill of Particulars in this case cures any notice or double jeopardy issues by identifying the enemy, the intelligence, and the indirect means. See Enclosure 3; see also RCM 906(b)(6).

The defense argues that the Specification of Charge I fails to allege a “general criminal intent.” See Def. Mot. at 2-3. However, the Specification of Charge I alleges the accused “knowingly gave intelligence to the enemy” and that he did so “without proper authority.” See Charge Sheet. This confusion over what is required to be alleged seems to arise from cases characterizing the nature of findings under Article 104(2). *United States v. Batchelor*, 22 C.M.R. 144 (C.M.A. 1956), is instructive on this point. In *Batchelor*, the Court of Military Appeals held that Article 104(2) does not require a specific criminal intent; thus, a law officer’s instructions on the elements of Article 104(2) were correct when he characterized Article 104(2) as requiring the finding of a general criminal intent and a finding as to words importing criminality. See *Batchelor*, 22 C.M.R. at 158. Like the prosecution in *Batchelor*, the United States agrees that Article 104(2) requires a showing or finding of criminal intent—but this is wholly different than what is required to be alleged in a specification. See *id.* at 157. In this case, the United States alleged a general criminal intent by specifying that the accused acted “knowingly” and “without proper authority.” See Charge Sheet. The inclusion of *mens rea* and words indicating criminality in the Specification of Charge I confirms the United States has adequately stated an offense under Article 104(2) in this case.

The defense repeatedly conflates what the United States is required to prove with what the United States is required to allege in order to adequately state an offense. This is readily apparent in the defense statement that “courts have uniformly held that the Government must allege and prove a general criminal intent to give intelligence to, or communicate with, the enemy under Article 104(2).” Def. Mot. at 3. For this proposition, the defense relies on *Batchelor*, *United States v. Anderson*, 68 M.J. 378 (C.A.A.F. 2010), and *United States v. Olson*, 22 C.M.R. 250 (C.M.A. 1957). See Def. Mot. at 3. These cases lend no support to the defense position. As discussed above, *Batchelor* held that Article 104(2) requires a finding of general criminal intent. *Anderson* and *Olson* are similarly inapplicable. The accused in *Anderson* was

charged with “Attempting to Aid the Enemy” under Article 104(1). An “attempt” under Article 104(1) requires the Government to prove a specific intent to aid the enemy as an element of the crime¹; thus, the Government could not allege any general criminal intent as contemplated by the defense. *See Anderson*, 68 M.J. at 384–85, nn. 4–7. As for *Olson*, the accused was charged with “Aiding the Enemy” under Article 104(1), not “Communicating” or “Giving Intelligence to the Enemy” under Article 104(2). *Olson*, 22 CMR at 254. Even assuming, *arguendo*, that Olson had been charged with “Communicating” under Article 104(2), “Communicating” and “Giving Intelligence” are different offenses. They have different model specifications and different elements. *See MCM*, United States, pt. IV, ¶ 28(b)(4)–(5), 28(f)(3)–(4) (2008). Model specifications are intended to guide drafters by incorporating the necessary elements, and the Specification of Charge I expressly alleges the elements for “Giving Intelligence” under Article 104(2). *See MCM*, Punitive Articles Discussion, at IV-1 (2008).

As stated above, the defense motion repeatedly emphasizes what the United States is required to prove in order to obtain a conviction. As such, this portion of the defense motion would be more appropriately styled as a motion for a finding of not guilty under RCM 917 after the close of the Government’s case. *See RCM 917(a)*. The Specification of Charge I adequately states an offense under Article 104(2).

II. ARTICLE 104, AS APPLIED, IS NOT UNCONSTITUTIONALLY VAGUE IN VIOLATION OF THE FIFTH AMENDMENT.

The defense argues that the Government’s application of Article 104, including the term “indirectly,” renders Article 104 unconstitutionally vague in violation of the Due Process Clause of the Fifth Amendment. *See Def. Mot.* at 8. In short, Article 104 is not unconstitutionally vague because an ordinary Soldier could understand what conduct was prohibited, and the application of the Article in this case does not encourage arbitrary and discriminatory enforcement.

Due process requires “fair notice” that an act is forbidden and subject to criminal sanctions. *See United States v. Bivins*, 49 M.J. 328, 330 (C.A.A.F. 1998); *see also Connally v. General Constr. Co.*, 269 U.S. 385, 391 (1926) (“A statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates due process.”). Due process also requires fair notice as to the standard applicable to the forbidden conduct. *See Parker v. Levy*, 417 U.S. 733, 755 (1974).

In determining the sufficiency of the notice, courts must examine the law “in light of the conduct with which [an accused] is charged.” *United States v. National Dairy Products Corp.*, 372 U.S. 29, 33 (1963) (citing *Robinson v. United States*, 324 U.S. 282 (1945)). There is a strong presumption of validity that attaches to an Act of Congress; hence, “statutes are not

¹ Under Article 104(a)(1), attempting to aid the enemy, the Government must prove (1) That the accused did a certain overt act; (2) That the act was done with the intent to aid the enemy with certain arms, ammunition, supplies, money, or other things; (3) That the act amounted to more than mere preparation; and (4) That the act apparently tended to bring about the offense of aiding the enemy with certain arms, ammunition, supplies, money, or other things. UCMJ art. 104(b)(2) (2008).

automatically invalidated as vague simply because difficulty is found in determining whether certain marginal offenses fall within their language.” *Jordan v. De George*, 341 U.S. 223, 231 (1951). Generally, a statute is not void for vagueness if it defines “the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement.” *Kolender v. Lawson*, 461 US 352, 357.

In *Parker*, the Supreme Court held that the standard of review for “void for vagueness” challenges to punitive Articles in the military justice system is whether “one could reasonably understand that his contemplated conduct is proscribed.” *Parker*, 417 U.S. at 754–57 (“Void for vagueness simply means that criminal responsibility should not attach where one could not reasonably understand that his contemplated conduct is proscribed.”) (citing *National Dairy Products Corp.*, 372 U.S. at 32). This standard of review provides Congress more deference in drafting laws governing the military than civilians. *See id.*, at 756 (“For the reasons which differentiate military society from civilian society, we think Congress is permitted to legislate both with greater breadth and with greater flexibility when prescribing the rules by which the former shall be governed than it is when prescribing rules for the latter.”).

A. A Soldier Could Reasonably Understand that Compromising Intelligence Through an Intermediary was Subject to Criminal Sanction in the U.S. Army.

It is “settled law that notice is determined through application of an objective test as to whether a person could ‘reasonably understand that his contemplated conduct is proscribed.’” *United States v. Saunders*, 59 M.J. 1, 10 (C.A.A.F. 2003) (citing *Parker*, 417 U.S. at 757); *see also United States v. Vaughan*, 58 M.J. 29, 41 (C.A.A.F. 2003) (Crawford, J., concurring) (“[I]t is not whether [the accused] was on notice that conduct like [his] was [punishable under Article 104], but rather, whether a reasonable enlisted person would be on notice that conduct like [the accused’s] was [punishable under Article 104].”). Courts may review the Manual for Courts-Martial, military case law, military customs and usage, and military regulations in determining whether sufficient notice was provided. *See Vaughan*, 58 M.J. at 30; *see also United States v. Boyett*, 42 M.J. 150, 153 (C.A.A.F. 1995) (noting that a court may take judicial notice of regulations as evidence of military customs).

The very language of Article 104 puts a reasonable Soldier on notice that compromising intelligence to the enemy through an intermediary would subject him or her to criminal action under the Article. Article 104 criminalizes the act of giving intelligence to the enemy, “either directly or indirectly.” *See UCMJ art. 104* (2008). The act must also be done “without proper authority.” *See id.* A reasonable Soldier would understand that sending intelligence through email to the enemy without authority, if the Soldier knew the enemy was on the other end of the transmission, constitutes “directly” giving intelligence to the enemy. A reasonable Soldier would also understand that posting intelligence on a website used by the enemy without authority, if the Soldier knew the enemy used the website, constitutes “indirectly” giving intelligence to the enemy. Although Article 104 was written long before the advent of the internet, reasonable Soldiers understand that use of the internet does not alter the common understanding of “giving.” The language of Article 104 provides sufficient notice that giving

intelligence to the enemy through the internet, without authority to do so, is a violation of the Article.

In addition to the plain reading of Article 104, Army regulations and mandatory training put every Soldier on notice that disclosing intelligence on the internet, without proper authority, may subject that individual to action under the UCMJ. Army Regulation (AR) 380-5, para. 1-21a, states that “Department of Army personnel will be subject to sanctions if they knowingly, willfully, or negligently disclose classified or sensitive information to unauthorized persons.” *U.S. Dep’t of Army, Reg. 380-5, Department of the Army Information Security Program* para. 1-21(a)(1) (29 September 2009). Those sanctions may include actions “taken under the UCMJ for violations of that Code and under applicable criminal law, if warranted.” *Id.*, at para. 1-21(b). A Soldier could reasonably understand, certainly during a time of war, that “unauthorized persons” included enemies of the United States. This regulation provides sufficient notice to Soldiers that compromising intelligence, without proper authority, may subject an individual to criminal sanctions.

Furthermore, annual Operations Security (OPSEC) training is mandatory for all Soldiers. *See* AR 530-1, *Operations Security* para. 4-2(a)(2)(b) (19 April 2007). OPSEC training under AR 530-1 puts every Soldier on notice that compromising intelligence on the internet may subject that person to criminal sanctions. AR 530-1, para. 2-1, states that all Army personnel “will prevent disclosure of critical and sensitive information in any public domain to include but not limited to the World Wide Web.” *Id.*, at para. 2-1(c). AR 530-1, para. 4-3(b), provides that “[w]hile the Internet is a powerful tool to convey information quickly and efficiently, it can also provide adversaries a potent instrument to obtain, correlate, and evaluate an unprecedented volume of aggregate information regarding U.S. capabilities, activities, limitations, and intentions.” *Id.*, at para. 4-3(b). AR 530-1, Appendix E-3(a)(2)(b) states that “the Internet has become an ever-greater source of open source information for adversaries of the U.S., websites in particular...are a potentially significant vulnerability.” *Id.*, at Appendix E-3(a)(2)(b). The failure to comply with AR 530-1 may subject a person to criminal sanction under the UCMJ. *See id.*, at para. 2-1(b)(2). In short, military regulations and training also provide notice to Soldiers that compromising intelligence to the enemy, without proper authority, could subject an individual to disciplinary action under the UCMJ.

Because of the plain language of Article 104, as well as the notice provided by Army regulations and mandatory training, Soldiers could reasonably understand that knowingly giving intelligence to the enemy through an intermediary was subject to criminal sanction under the UCMJ.

B. The Application of Article 104 in this Case does not Encourage Arbitrary and Discriminatory Enforcement.

The void for vagueness doctrine “focuses both on actual notice to citizens and arbitrary enforcement.” *Kolender v. Lawson*, 461 U.S. 352, 357 (1983). However, courts recognize “that the more important aspect of [the] vagueness doctrine ‘is not actual notice, but the other principal element of the doctrine—the requirement that a legislature establish minimal guidelines to govern law enforcement.’” *Id.*, at 357 (citing *Smith v. Goguen*, 415 U.S. 566, 574 (1974) (noting

that without minimal guidelines, a statute may permit “a standardless sweep [that] allows policemen, prosecutors, and juries to pursue their personal predilections”). A statute should aim to contain, but not wholly restrict, the exercise of some discretion in enforcement. *See Grayned v. City of Rockford*, 408 U.S. 104, 114 (1972) (“As always, enforcement requires the exercise of some degree of police judgment, but, as confined, that degree of judgment [should be] permissible.”).

Determining whether an Article may lead to arbitrary enforcement requires military courts to analyze whether an Article provides a clear standard to guide enforcement. *See United States v. Cochran*, 60 M.J. 632, 634 (N-M. Ct. Crim. App. 2004). In *Cochran*, the defense argued a Navy Instruction was void for vagueness because, *inter alia*, “[i]t [was] impossible to determine which conduct is ‘unlawful’ and therefore criminal and which is not under the order without guessing.” *Id.*, at 634. The Court denied this argument because the instruction “[did] not encourage either arbitrary or discriminatory enforcement.” *Id.*, at 635. Requiring the “intent to induce intoxication,” the Court reasoned, “establishe[d] a clear standard against which an individual’s conduct is measured.” *Id.*, at 635.

Article 104, by its terms, does not encourage arbitrary and discriminatory enforcement. Instead, it provides clear standards by which to guide enforcement. Article 104 requires, *inter alia*, that the person “knowingly” give intelligence to the enemy. *See* UCMJ art. 104 (2008). This *mens rea* requirement guards against arbitrary enforcement by establishing that mere negligent disclosures or even wanton disclosures are not subject to prosecution under Article 104. In addition to the *mens rea* requirement, a Soldier must give “intelligence” to the enemy. *See id.* The requirement to give “intelligence” further narrows enforcement of the Article because intelligence “means any helpful information, given to and *received by* the enemy, which is true, at least in part.” *See Benchbook*, p. 323 (emphasis added). The requirement of receipt of intelligence by the enemy ensures that a prosecution will not be pursued without evidence of the enemy’s possession of the intelligence. Lastly, the Soldier must give intelligence to the enemy “without proper authority.” *See* UCMJ art. 104 (2008). This limitation protects the Soldier who is authorized by position or circumstance to give intelligence and ensures that only wrongful acts are pursued. The parade of hypotheticals offered by the defense, such as the argument that a discussion with a reporter regarding Post-Traumatic Stress Disorder would constitute a violation of Article 104, ignore these limiting factors and do not constitute an offense punishable under Article 104. *See* Def. Mot. at 9.

III. ARTICLE 104 IS NOT SUBSTANTIALLY OVERBROAD IN VIOLATION OF THE FIRST AMENDMENT.

The defense argues that the Government’s application of Article 104, including the term “indirectly,” renders Article 104 substantially overbroad in violation of the First Amendment. *See* Def. Mot. at 10. The defense argument has no merit.

As a practical matter, use of “indirectly” in the context of Article 104 is not novel, nor is the Government’s use of the term within the Specification of Charge I. William Winthrop’s *Military Law and Precedents* provides the following guidance:

The modes of holding correspondence and giving intelligence already instanced have been mainly of a direct character. It was, however, the indirect modes which...principally exercised the vigilance of our military authorities. The proceeding of this sort which it was found especially necessary to denounce and prohibit was the publication in newspapers of particulars in regard to [information which] might readily be communicated to the enemy; and in several instances the offence [sic] thus committed was made the subject of charges under the [precursor to Article 104], or of trial by military commission. The publishing by way of advertisement in newspapers, of "Personals," by means of which an indirect correspondence was maintained with individuals within the enemy's lines, was also expressly prohibited.

William Winthrop, *Military Law and Precedents*, 634 (2d ed. 1920 reprint). Despite the historical basis for use of the term "indirectly" in the context of publishing intermediaries, the defense maintains that the Government's interpretation or application of Article 104 to the conduct in this case, including use of "indirectly," criminalizes a substantial amount of constitutionally protected speech. *See* Def. Mot. at 11. The United States disagrees.

A law may be invalidated as overbroad under the First Amendment if "a substantial number of its applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep." *United States v. Stevens*, 130 S.Ct. 1577, 1587 (quoting *Washington State Grange v. Washington State Republican Party*, 522 US 442, 449 n.6 (2008)). The Government's interpretation or application of Article 104 to the conduct in this case, including use of "indirectly," does not prohibit constitutionally protected speech. Rather, the defense mischaracterization of the Government's "interpretation" of Article 104 is misguided in that the hypotheticals they offer do not constitute an offense punishable under Article 104.


The defense argues that Article 104 "categorically prohibits any unauthorized communication with an enemy, regardless of whether the communication contains any intelligence information" and warns that the Government could prosecute an individual for "a communication that is not aimed at an enemy but may be indirectly accessed by the enemy...." Def. Mot. at 11. Aside from the fact that this example is inapplicable to the present case, as the accused was charged with "Giving Intelligence to the Enemy" not "Communicating with the Enemy," it is an inaccurate and incomplete statement of the law. The defense formulation ignores the fact that the communication must be intended to reach the enemy. *See Benchbook*, p. 324. Thus, this hypothetical raises no constitutional issues.

Likewise, the hypotheticals raised by the defense regarding information placed on the internet that "might be accessed by the enemy" are similarly inapplicable. *See* Def. Mot. at 11. The United States has not charged the accused under the Specification of Charge I with knowing that information "might be accessed by the enemy." *See* Charge Sheet. The United States has charged the accused with "knowingly" giving intelligence to the enemy "through indirect means." *See* Charge Sheet. Actual knowledge is required—not knowledge that information "might be accessed." *See* UCMJ art. 104(c)(5)(c) (2008). This difference invalidates all of the


defense hypotheticals involving simple discussions with reporters or the press, and extinguishes any claim that Article 104 is substantially overbroad. Further, assuming the accused under the hypothetical “knew” that by giving information to a reporter, he was giving it to the enemy – not that the accused generally knew that the enemy uses the internet or reads newspapers – the United States is still required to prove those discussions occurred “without proper authority,” a fact the defense ignores. Lastly, “giving” intelligence requires that the United States prove receipt of the information by the enemy. *See Benchbook*, p. 323; *Winthrop*, *supra* p. 8, at 634 (“It is necessary that the enemy shall have been *actually informed*.”). The defense claim that Article 104 is substantially overbroad in violation of the First Amendment is without merit.

CONCLUSION

The United States respectfully requests this Court DENY the defense motion to dismiss the Specification of Charge I for failure to state an offense. The United States also requests this Court deny the defense request to declare the term “indirectly,” as used in Article 104, unconstitutionally vague in violation of the First and Fifth Amendments to the United States Constitution, or substantially overbroad in violation of the First Amendment to the United States Constitution. Finally, the United States respectfully requests this Court adopt the *Benchbook’s* elements for the offense of Giving Intelligence to the Enemy under Article 104.


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I certify that I served or caused to be served a true copy of the above on Mr. David E. Coombs, Civilian Defense Counsel, via electronic mail, on 12 April 2012.


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